

GLENN M. BROWN

Petitioner,

VS.

NANCY A. BERRYHILL

Respondent.

CASE NO. 18-cv-03160-YGR

**ORDER GRANTING PETITIONER'S MOTION
FOR SUMMARY JUDGMENT AND DENYING
RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT**

Re: Dkt. No. 19, 20

Petitioner/Claimant Glenn M. Brown filed this action against defendant Nancy Berryhill as Acting Commission of the Social Security Administration (“Commissioner”) seeking judicial review of the Commissioner’s finding that he was not disabled under section 1614(a) of the Social Security Act (“the Act”). Brown contends the administrative law judge (ALJ) improperly rejected his testimony regarding his disability, and that the ALJ’s Step-Four finding is not supported by substantial evidence.

Having carefully considered the papers submitted and the record in this case, and for reasons set forth below, Brown's motion is **GRANTED**, the Commissioner's motion is **DENIED**, and this action is remanded for further consideration.

I BACKGROUND

A. Procedural History

On August 18, 2014, plaintiff Glenn M. Brown filed an application for Title II, Social Security Disability Insurance benefits, claiming disability since June 26, 2014. (Dkt. No. 14,

1 Administrative Record (“AR”) 166–68.)¹ On November 14, 2016, the ALJ held a hearing wherein
2 plaintiff and a vocational examiner testified. (AR 28–57.) On March 16, 2017, the ALJ issued his
3 determination that plaintiff was not disabled under the Social Security Act. (AR 23.) The
4 Appeals Council denied plaintiff’s request to review the ALJ’s decision on March 21, 2018. (AR
5 1–6.) The ALJ’s decision then became the final decision of the Social Security Administration
6 Commissioner. On May 25, 2018, plaintiff initiated the instant action seeking judicial review of
7 the ALJ’s decision.

8 **B. Summary of Evidence in the Underlying Proceedings**

9 Brown was 62 years old at the time of the hearing before the ALJ. (AR 31.) Brown
10 alleges disability beginning June 26, 2014, based on a combination of impairments including
11 diabetes and peripheral neuropathy of both feet. (AR 167, 178–85.)

12 On April 16, 2014, Brown was treated in the emergency room for dizziness and light-
13 headedness. He had very high blood sugar and had recently lost 15 pounds. He had been
14 urinating frequently at night and had been extremely thirsty. (AR 272.) Brown was diagnosed
15 with diabetes. (AR 273.)

16 On July 13, 2014, Brown was treated in the emergency room, this time for foot and leg
17 pain. He had recently been diagnosed with diabetes and clinicians opined he had peripheral
18 neuropathy in his legs and feet. He was prescribed over-the-counter pain medication as well as
19 Gabapentin. At the time, Brown had recently lost his job and medical insurance and could not see
20 his regular physician at Kaiser. (AR 259–60.)

21 On August 14, 2014, Brown was again treated for leg and foot pain in the emergency
22 room. Brown reported that Oxycodone had been effective for his pain, but he had run out at that
23 time. Clinicians prescribed Naprosyn for his pain and urged him to start the Gabapentin he had
24 been prescribed. (AR 263.)

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27 ¹ The claim was initially denied November 17, 2014, and reconsideration was denied
28 March 5, 2015. (AR 16, 75, 82.) Claimant filed a request for hearing March 10, 2015. (AR 88.)

1. Brown's Testimony

Brown has a high school education (AR 49) and has performed work in the past five years as a truck driver and a stock clerk. (AR 50.) At the time of the November 14, 2016 hearing, Brown testified that his only work was performing in-home care for his roommate for about nine hours each week. (AR 31.) Previously, he worked as a donation processor/sorter at Goodwill for four and one half years, and as a truck driver for thirteen years before that. (AR 32-33.) The job at Goodwill required that he stand and sort items all day. (AR 34.) Brown stopped working at Goodwill on June 26, 2014, due to the pain, pressure, and tingling in his feet. (AR 34.) He had missed days due to the pain and was told he was going to be terminated when he resigned. (*Id.*)

Brown testified that, at the time of the hearing, he could lift about 75 pounds but could stand for only 15 minutes and walk for 20 to 25 minutes before needing to rest. (AR 38.) Brown clarified that while he could lift up to 50 pounds once or twice, he could not do it repeatedly throughout the day. (AR 54-55.) He could sweep a little, cook, and do some laundry at home. (AR 38.) He testified that he tried to do a little weight-bearing exercise, but his neuropathy affected his ability to do more than about five squats at a time. (AR 39.)

Brown testified that his symptoms had worsened over the year since his disability application. (AR 41.) He testified that he was no longer able to drive a 16-wheeler truck he could not feel the brake pedal and worried that he could not stop a truck in time, endangering others on the road. (AR 42-43.) He stated that he could not stand for a full work day because of the pain and numbness in his legs. (AR 44.) He also testified that he had worked as a cook in the past and could have done that job for no more than 4-6 hours per day because it requires a lot of standing. (AR 44.) However, the ALJ said that any work more than 15 years before (*i.e.*, prior to 2001) would not be considered. (AR 45-46.)

Though Brown testified to more recent treatment, at the time of the hearing he had submitted only his medical records from several months in 2014 and no records from any visits thereafter. (AR 34-35, 256-301.) For instance, Brown testified that he had been seen by a physician in October 2016 but the administrative record has no documentation of that visit. (AR

1 34-35.)² Brown testified that he took medication for his blood pressure and diabetes, as well as
2 over-the-counter pain medication and Gabapentin for neuropathy pain, though it made him sleepy.
3 (AR 40.) He testified that a doctor performed diagnostic tests on his feet about one month prior to
4 the hearing and informed him that he had severe nerve damage because he did not feel anything in
5 his feet. (AR 41.)

6 2. *Vocational Expert's Testimony*

7 The only other witness in the administrative hearing was Jeff Beeman, a vocational expert.
8 (AR 50.) Beeman identified that Brown's past relevant work would be categorized medium, semi-
9 skilled work as a retail processor/stock clerk and a truck driver. (AR 50.) The ALJ asked Beeman
10 to consider a hypothetical "individual able to lift 50 pounds, sit, stand, and walk six hours each in
11 an eight-hour day," and therefore of medium residual functional capacity. (AR 50.) Beeman
12 opined that such an individual could perform both of Brown's past jobs. (AR 51.) Brown's
13 attorney asked Beeman to consider a hypothetical individual limited to sitting eight hours a day
14 and standing no more than two hours a day, Beeman testified that such an individual could not
15 perform either of Brown's past jobs. (AR 51.) The ALJ then asked if someone able to lift 50
16 pounds, sit eight hours, and stand and walk two hours could perform the truck driver job but not
17 the stock job. (AR 52-53.) Brown's attorney added to the hypothetical scenario limitations
18 preventing the person from using foot controls to operate the brakes, gas, and clutch of a truck,
19 and Beeman agreed that the person could not work as a truck driver or any of Brown's past work.
20 (AR 53-54.) Likewise, Beeman agreed that someone who could only lift 50 pounds infrequently
21 could not perform the truck driver job. (AR 55.)

22 **II. LEGAL FRAMEWORK**

23 This Court has jurisdiction under 42 U.S.C. section 405(g). The Court may reverse the
24 ALJ's decision only if it "contains legal error or is not supported by substantial evidence." *Orn v.*
25

26 ² At the hearing, the ALJ ordered an internal medicine evaluation to update the medical
27 information and kept the administrative record open to allow Brown to submit additional medical
28 records after the hearing. (AR 35-37.) However, the administrative record does not contain any
additional medical records or evidence of a clinical examination occurring after the November 14,
2016 hearing, nor does the ALJ appear to have considered any in reaching his decision. (See AR
24-27, List of Exhibits, attached to ALJ Decision.)

1 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a
2 reasonable mind might accept as adequate to support a conclusion.” *Burch v. Barnhart*, 400 F.3d
3 676, 679 (9th Cir. 2005) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)). It is
4 “more than a mere scintilla but less than a preponderance.” *Bayliss v. Barnhart*, 427 F.3d 1211,
5 1214 n.1 (9th Cir. 2005) (quoting *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). Where the
6 evidence is susceptible to more than one rational conclusion, the Court must uphold the ALJ’s
7 decision. *Burch*, 400 F.3d at 679. The Court must “consider the entire record as a whole,
8 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s
9 conclusion, and may not affirm simply by isolating a specific quantum of supporting evidence.”
10 *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d
11 1028, 1035 (9th Cir. 2007)). The Court must rely “only on the reasons provided by the ALJ in the
12 disability determination and may not affirm the ALJ on a ground upon which he did not rely.” *Id.*
13 at 1010; *accord Treviso v. Berryhill*, 871 F.3d 664 (9th Cir. 2017).

14 Under the Social Security Act, individuals who are “under a disability” are eligible to
15 receive benefits. 42 U.S.C. § 423(a)(1)(D). A “disability” is defined as “any medically
16 determinable physical or mental impairment” which prevents one from engaging “in any
17 substantial gainful activity” and is expected to result in death or last “for a continuous period of
18 not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from one or
19 more “anatomical, physiological, or psychological” conditions “demonstrable by medically
20 acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. § 423 (d)(3). The Act limits
21 eligibility for benefits to those whose impairments “are of such severity that [they are] not only
22 unable to do [their] previous work, but cannot, considering [their] age, education and work
23 experience, engage in any other kind of substantial gainful work which exists in the national
24 economy. . . .” 42 U.S.C. § 423(d)(2)(A); *see also Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th
25 Cir. 2001).

26 The Act uses a five-step sequential framework to determine whether a claimant is disabled.
27 At Step One, the ALJ must determine whether the claimant is engaged in substantially gainful
28 activity. 20 C.F.R. § 404.1520(b). A person is engaged in substantially gainful activity if engaged

1 in work involving significant physical or mental activities. 20 C.F.R. § 404.1572(a). Gainful
2 work activity is defined as “work usually done for pay or profit,” regardless of whether the
3 claimant receives a profit. 20 C.F.R. § 404.1572(b). If the claimant is presently engaged in
4 substantially gainful activity, he is not disabled. If the claimant is not engaged in substantially
5 gainful activity, the ALJ proceeds to Step Two.

6 At Step Two, the ALJ must determine whether the claimant has an impairment or
7 combination of impairments that is severe. 20 C.F.R. §§ 404.1520(c), 416.920(c). A “severe”
8 impairment is defined in the regulations as one that significantly limits an individual’s ability to
9 perform basic work activities. If the claimant does not have a severe impairment or combination
10 of impairments, he is not disabled. If the claimant does have a severe impairment or combination
11 of impairments, the ALJ proceeds to Step Three.

12 At Step Three, the ALJ must determine whether a claimant’s impairment or combination
13 of impairments “meets or equals” the criteria of an impairment listed in 20 C.F.R. Part 404,
14 Subpart P, App. 1., 20 C.F.R. §§ 404.1520(d), 416.920(e). If the claimant’s impairment or
15 combination of impairments meets the listed criteria and the duration requirement, the claimant is
16 disabled. 20 C.F.R. § 404.1509. If the impairment or combination of impairments does not meet
17 the criteria of a listing or does not meet the duration requirement, the ALJ proceeds to the next
18 step.

19 At Step Four, the ALJ must determine whether the claimant has the ability to perform past
20 relevant work. 20 C.F.R. § 404.1520(f). Before reaching Step Four in the sequential evaluation,
21 the ALJ must determine the claimant’s residual functional capacity (“RFC”). 20 C.F.R. §
22 404.1520(e). A claimant’s RFC consists of her ability to engage in physical and mental work
23 activity on an ongoing basis, in spite of any limitations from impairments. The ALJ considers
24 both severe and non-severe impairments in determining the claimant’s RFC. 20 C.F.R. §§
25 404.1520(e), 416.920(e). If the claimant has the RFC to perform past relevant work, he is not
26 disabled. If the claimant is unable to do past relevant work or has no past relevant work, the ALJ
27 proceeds to the final step in the sequential evaluation.

28 At Step Five, the ALJ considers the claimant’s RFC, age, education, and work experience

1 to determine whether the claimant can perform any other work. 20 C.F.R. §§ 404.1520(f),
2 416.920(f). “Substantial work activity is work activity that involves doing significant physical or
3 mental activities. . . . [W]ork may be substantial even if it is done on a part-time basis or if you do
4 less, get paid less, or have less responsibility than when you worked before.” 20 C.F.R. §§
5 404.1572(a), 416.972(a). If the claimant can perform other work, he is not disabled. If the
6 claimant cannot perform other work and fulfills the duration requirement, he is disabled.

7 In any action brought by or against the United States, the Equal Access to Justice Act
8 requires that “a court shall award to a prevailing party other than the United States fees and other
9 expenses . . . unless the court finds that the position of the United States was substantially justified
10 or that special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A).

11 III. ALJ’S DECISION

12 In an eight-page decision dated March 16, 2017, the ALJ applied the five-step sequential
13 analysis to determine that claimant was not eligible for disability insurance benefits. (AR 13-27.)
14 Briefly, the ALJ determined as follows:

15 A. Step One

16 The ALJ found at Step One of the sequential analysis that Brown had not engaged in
17 substantial gainful activity since the alleged onset date of June 26, 2014. Although Brown had
18 been performing in-home health care for his roommate for nine hours a week, the ALJ found this
19 work did not rise to the level of substantial gainful activity.

20 B. Step Two

21 At step two, the ALJ found Brown had two severe impairments: diabetes mellitus and
22 peripheral neuropathy. The ALJ noted that “claimant stated that his ability to work was limited
23 because he cannot stand for a long time because his feet and legs begin to hurt.” (AR 18.) He
24 additionally noted that Brown “has pain in his left arm that occurs on a daily basis (Exhibit 4E).”
25 (AR 18.)

26 C. Step Three

27 At step three, the ALJ found that Brown’s “impairments did not meet or equal any listed
28 impairment (within the context of the listings set forth at 9.00, 1.02, and 11.14).” (AR 18.)

1 **D. RFC Determination**

2 The ALJ found that Brown had “the residual functional capacity to perform medium work
3 as defined in 20 CFR 404.1567(c) except [sic] lift 50 pounds and can sit, stand, and walk for six
4 hours each in an eight[-]hour day.” (AR 19.) The ALJ noted that this evaluation required him to
5 consider “the intensity, persistence, and limiting effects of the claimant’s symptoms to determine
6 the extent to which they limit the claimant’s functional limitations.” (AR 19.) The ALJ noted
7 that, whenever statements about those factors were not substantiated by objective medical
8 evidence, he was required to consider other evidence in the record to determine if Brown’s
9 symptoms limit the ability to do work-related activities. (*Id.*) The ALJ recited the claimant’s
10 testimony regarding his prior work and educational level, his physical symptoms and functional
11 limitations, his medical conditions and his medications. (*Id.*) The ALJ found, based upon that
12 evidence, that Brown’s “medically determinable impairments could reasonably be expected to
13 cause the alleged symptoms; however, the claimant’s statements concerning the intensity,
14 persistence and limiting effects of these symptoms are not entirely consistent with the medical
15 evidence and other evidence in the record for the reasons explained in this decision.” (*Id.*) The
16 ALJ went on to state as follows:

17 The record reflects the claimant’s history of diabetes mellitus and peripheral
18 neuropathy. He alleges an inability to work because of these conditions (Exhibit
19 1F-3F). However, the weight of the objective evidence does not support the
20 claimant’s claims of disabling limitations to the [sic] degree. The medical
21 evidence indicates the claimant received routine conservative treatment for
22 complaints of bilateral lower extremity pain and swelling and diabetes. The
23 positive objective clinical and diagnostic findings since the alleged onset date
24 detailed below do not support more restrictive functional limitations than those
25 assessed herein. There is no medical source statement from an examining or
26 treating physician that endorses the extent of the claimant’s alleged functional
27 limitations.

28 The claimant’s record does show that he has diabetes mellitus and peripheral
29 neuropathy. The claimant has addressed his pain with medication. There is little
30 in the record indicating that these problems have advanced to the point that the
31 claimant’s mobility is severely reduced, or that a more drastic therapeutic
32 intervention is required. On the contrary, the claimant’s record simply shows
33 emergency room visits where the claimant’s concerns and symptomology are
34 addressed. When coupled together, these problems could certainly serve to reduce
35 his overall exertional capacity. However, there is little suggestion in the record
36 that the claimant’s neuropathy has critically advanced, or that he has lost all
37 feeling in his extremities, or that a dramatic intervention, such as amputation is
38 required. To the contrary, this record indicates that the claimant’s neuropathy is
39 fairly mild.

1 (AR 20.)

2 The ALJ summarized the medical records, stating that the medical records demonstrated
3 that Brown was “essentially normal except for subjective complaints of pain and swelling (Exhibit
4 1F-2F) . . . [and] fail[ed] to document that the claimant has been hospitalized for his impairment or
5 indicate that the claimant had received significant active care other than for conservative routine
6 maintenance,” with medications largely controlling his symptoms. (AR 21.) The ALJ opined
7 that that the “record fail[ed] to document any objective clinical findings” to support plaintiff’s
8 alleged disabling impairments. (AR 20.) Specifically, there was “no medical source statement
9 from an examining or treating physician” that endorsed plaintiff’s alleged functional limitations.
10 (*Id.*) Rather the record indicated that plaintiff “received routine conservative treatment” and that
11 his “neuropathy is fairly mild.” (AR 20.) Plaintiff’s treatment was confined largely to three
12 emergency room (“ER”) visits, where “[o]n exam, he appeared pain free,” he had a normal gait,
13 his “sensation [was] intact,” he exhibited a normal range of motion and motor strength, and was
14 observed “walking very briskly to triage in sandal[s].” (AR 20–21.) At his final recorded visit to
15 the ER on August 14, 2014, the ALJ noted that despite “complaining of bilateral feet and leg
16 shooting pain,” the plaintiff “ambulated with steady gait,” his “leg[s] appear well,” and once he
17 was seen by a physician, “he stated that he quit work and needed disability paperwork filled out.”
18 (AR 21, 263, 265.) The ALJ also found significant that plaintiff’s “medications have been
19 relatively effective in controlling [his] symptoms.” (AR 21.)

20 The ALJ further noted that he was required to consider factors in addition to the objective
21 medical evidence in determining whether to credit the claimant’s own testimony as to severity,
22 including: claimant’s activities of daily living; the type, dosage, effectiveness, and side effects of
23 medication taken to alleviate pain or other symptoms; other treatment for pain and symptom relief;
24 and any other factors regarding functional limitations or restrictions due to pain or other
25 symptoms. The ALJ found that Brown’s range of activities of daily living, including light
26 housekeeping and cooking and performing in-home health services, was “not consistent with total
27 disability.” (AR at 21.)

28

1 **E. Step Four**

2 At step four of the sequential analysis, the ALJ found Brown was “capable of performing
3 past relevant work as a cook [*sic*] and driver [because . . . [t]his work does not require the
4 performance of work-related activities precluded by the claimant’s residual functional capacity.”
5 (AR 22.) Summarizing the vocational expert’s testimony, the ALJ found that Beeman responded
6 to three different hypotheticals, two of which indicated that claimant could perform his past work
7 as a stock clerk and a truck driver, both “medium” exertional level jobs.³ The ALJ noted that
8 Beeman’s opinion of a third hypothetical—the hypothetical that accounted for inability to use foot
9 controls—would have precluded Brown from performing either of his past jobs (AR 22.)
10 However, the ALJ ultimately determined that Brown “retains the ability to perform both of his
11 past jobs, using the residual functional capacity in hypothetical question number one.” Thus, the
12 ALJ concluded that Brown had not been under a disability for purposes of the Act from June 26,
13 2014, to the date of the March 16, 2017 decision. (AR 23.)

14 **IV. DISCUSSION**

15 In his motion for summary judgment, Brown argues the ALJ erred in two ways:
16 (1) improperly discrediting Brown’s testimony without clear and convincing reasons to reject it;
17 and (2) relying on Beeman’s opinion only for “hypothetical number one,” which omitted critical
18 functional limitations, resulting in a no-disability determination not supported by the record. The
19 Court considers each in turn.

20 **A. Discrediting Brown’s Testimony**

21 Brown first contends that the ALJ did not offer clear and convincing reasons to discount
22 his testimony as to the intensity, persistence, and limiting effects of his symptoms. In *Garrison v.*
23 *Colvin*, 759 F.3d 995 (9th Cir. 2014), the Ninth Circuit reiterated a two-step analysis by which an
24 ALJ must determine if a claimant’s subjective pain and symptom testimony is credible. “First, the
25 ALJ must determine whether the claimant has presented objective medical evidence of an

26 ³ The first two hypotheticals were: (1) an individual who can lift 50 pounds and can sit,
27 stand, and walk for six hours each in an eight-hour day; and (2) an individual who can lift 50
28 pounds, can sit for eight hours in an eight-hour day, and can stand and walk for two hours in an
eight-hour day.

1 underlying impairment ‘which could reasonably be expected to produce the pain or other
2 symptoms alleged.’” *Id.* A claimant is not required to provide objective evidence of pain or of the
3 severity of their symptoms, only that the impairment “reasonably [could] have caused some degree
4 of the symptom.” *Id.* at 1014 (citing *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996)). Once
5 this first step is satisfied, the ALJ can reject the claimant’s testimony about the severity of his
6 symptoms and pain only if there is affirmative evidence of malingering or other findings as to
7 credibility based upon clear and convincing reasons. *Id.* at 1014-15 (citing *Smolen*, 80 F.3d at
8 1281 and *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006)). Stated otherwise, “[i]f
9 the ALJ finds that the claimant’s testimony as to the severity of h[is] pain and impairments is
10 unreliable, the ALJ must make a credibility determination with findings sufficiently specific to
11 permit the court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”
12 *Thomas v. Barnhart*, 278 F.3d 947, 958–59 (9th Cir. 2002) (citing *Bunnell v. Sullivan*, 947 F.2d
13 341, 345–46 (9th Cir. 1991) (en banc)).

14 “The clear and convincing standard is the most demanding required in Social Security
15 cases.” *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002). A credibility
16 determination should consider such factors as “reputation for truthfulness, inconsistencies either in
17 testimony or between testimony and conduct, daily activities, work record, and testimony from
18 physicians and third parties concerning the nature, severity, and effect of the symptoms of which
19 [claimant] complains.” *Thomas*, 278 F.3d at 959 (citing *Light v. Social Security Administration*,
20 119 F.3d 789, 792 (9th Cir. 1997)).

21 In *Garrison*, the Ninth Circuit found that the ALJ improperly rejected the claimant’s pain
22 testimony by finding it inconsistent with her ability to carry out certain activities of daily living,
23 and by deeming her symptoms “improved” with “conservative” treatment. *Garrison*, 759 F.3d at
24 1015-16. Rather, the record demonstrated that the claimant experienced only partial and short-
25 lived pain relief from her treatment regime, and that her daily living activities—limited and
26 interspersed with many periods of rest—were not inconsistent with an inability to perform gainful
27 work activity. *Id.* As the Ninth Circuit reiterated in *Garrison*, “[w]e have repeatedly warned that
28 ALJs must be especially cautious in concluding that daily activities are inconsistent with

1 testimony about pain, because impairments that would unquestionably preclude work and all the
2 pressures of a workplace environment will often be consistent with doing more than merely
3 resting in bed all day.” *Id.* at 1016.

4 By contrast, in *Thomas* the Ninth Circuit held that the ALJ provided “specific, clear and
5 convincing reasons for discounting” the claimant’s pain and symptom severity testimony.
6 *Thomas*, 278 F.3d at 959. In addition to the lack of objective medical evidence to support her
7 descriptions of her pain and limitations, the record also provided evidence undermining her
8 credibility, including: changing stories and lack of candor about alcohol and drug use to various
9 providers and examiners; failure to give maximum or consistent effort in her capacity
10 examinations; and other history of malingering or avoidance of work. *Id.*

11 Here, the ALJ’s decision summarized Brown’s testimony and found it to be “not entirely
12 consistent with the medical evidence and other evidence in the record” with respect to intensity,
13 persistence, and the limiting effects of his symptoms. (AR 20.) The ALJ determined that his
14 testimony was “not fully consistent” for two reasons. One, the ALJ found the testimony
15 inconsistent with evidence that he could perform daily living activities (“prepare simple meals, do
16 household chores including laundry, sweep and vacuum, go outside, shop in stores, handle
17 finances, read, watch television, exercise, g[o] on the internet”) as well as perform in-home health
18 care services nine hours a week. (AR 21.) The ALJ stated that “[t]his broad range of activities of
19 daily living is not consistent with total disability” and “undermines . . . the claimant’s allegations
20 of disabling functional limitations.” (*Id.*) Second, the ALJ found Brown’s testimony inconsistent
21 with evidence that his prescribed medications were “relatively effective in controlling” his
22 symptoms. (AR 21.) With respect to the treatment Brown received, he stated “the record fails to
23 document that the claimant has been hospitalized for his impairment or indicate that the claimant
24 had received significant active care other than for conservative routine maintenance.” (AR 21.)

25 While the Commissioner contends the ALJ’s decision to discount Brown’s credibility was
26 supported by clear and convincing reasons, the reasons given closely resemble those in *Garrison*
27 and are similarly insufficient. First, the ALJ offered no reason to suggest that Brown was
28 malingering or that he had been untruthful in other testimony. Second, as in *Garrison*, 759 F.3d at

1 1015-16, Brown's ability to carry out the daily living activities identified by the ALJ is not
2 inconsistent with his testimony that he could stand for only 15 minutes and walk for 20 to 25
3 minutes before needing to rest. Brown's ability to engage in those simple activities, many of
4 which did not require being on his feet at all, does not undermine his statements about his inability
5 to stand and walk for longer periods, or to have sufficient sensation in his feet to operate a truck
6 safely. Even performing in-home care services, such as cooking, for a roommate nine hours a
7 week is not inconsistent with an inability to perform full-time work requiring standing and
8 walking several hours a day.

9 Third, as the ALJ here acknowledged, Brown testified his medications caused him
10 sleepiness and that his symptoms had worsened in the last year, particularly the numbness and loss
11 of feeling in his feet. (AR 19, 40-41.) Brown also testified that he took medication for neuropathy
12 pain, but that the medication "really doesn't help it." (AR 40.) Indeed, none of the emergency
13 room records summarized by the ALJ indicate the medications prescribed for Brown were
14 effective in controlling pain, numbness, tingling, and inability to be on his feet for long periods of
15 time. Thus, the objective medical evidence did not contradict Brown's testimony about the
16 severity of his symptoms and the limitations they caused.

17 The ALJ's determination that plaintiff's testimony was not credible because plaintiff had
18 "not been hospitalized for his impairments" (AR 21), did not require a dramatic intervention, such
19 as amputation" (AR 20), and had not "lost all feeling in his extremities" (AR 20) indicates that the
20 ALJ employed a much different standard for assessing credibility than is supported by the
21 caselaw. "The Social Security Act does not require that claimants be utterly incapacitated to be
22 eligible for benefits." *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); see also *Kuharski v.*
23 *Colvin*, No. 2:12-CV-01055-AC, 2014 WL 3385183, at *4 (E.D. Cal. July 10, 2014) (ALJ's
24 reliance on the lack of hospitalization was unreasonable and did not constitute a clear and
25 convincing reason for rejecting plaintiff's credibility regarding his mental limitations); *Bagdoyan*
26 *v. Colvin*, No. CV 12-5312 RNB, 2013 WL 941965, at *4 (C.D. Cal. Mar. 11, 2013) (lack of
27 history of hospitalization did not constitute a clear and convincing reason to discount plaintiff's
28

1 excessive pain testimony).⁴

2 “[A]lthough [courts] will not fault the agency merely for explaining its decision with less
3 than ideal clarity, we still demand that the agency set forth the reasoning behind its decisions in a
4 way that allows for meaningful review.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.
5 2015) (internal citations and quotation omitted). Where the ALJ’s written decision simply states
6 the claimant was not credible and summarizes the medical evidence in support of the
7 determination without “identify[ing] the testimony [h]e found not credible . . . [and] link[ing] that
8 testimony to the particular parts of the record supporting h[is] non-credibility determination,” the
9 ALJ fails to meet the standard required by the Ninth Circuit. *Brown-Hunter v. Colvin*, 806 F.3d
10 487, 494 (9th Cir. 2015). Here, the ALJ failed to explain his reasoning for discrediting Brown’s
11 testimony in a way that would permit meaningful review by this Court. Therefore, the Court finds
12 that reversal of the decision and remand to the agency for further determination and explanation is
13 warranted.⁵

14 **B. Failure to Consider Vocational Expert Opinion About Additional
15 Hypotheticals**

16 Brown further seeks to set aside the Commissioner’s denial of benefits on the grounds that

17
18 ⁴ In addition, Brown testified that he had been tested by a doctor and could not feel
19 anything in his feet approximately a month before the hearing. The ALJ held the record open to
20 permit Brown to either submit additional medical records, but at the same time ordered an internal
medicine evaluation. (AR 35-37.) He stated that he was ordering the evaluation “in case the
21 information that you get from Tom Waddell clinic is not very complete. That way, we’ll have
something to, you know, make a decision on.” The ALJ’s decision is completely silent as to
22 whether additional medical records were provided or considered, and whether Brown underwent
the evaluation the ALJ ordered. The lack of medical records cannot be the sole basis for
23 discounting Brown’s testimony. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). The ALJ
offered no clear and convincing reason to have discounted the testimony that Brown was unable to
24 feel anything in his feet, which plainly would be incompatible with a finding that he is capable of
performing both of his past jobs.

25 ⁵ Brown also argues that the ALJ failed to consider whether loss of his job and lack of
26 medical insurance played a role in Brown obtaining limited treatment for his symptoms. See
27 *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995) (“a claimant who meets the disability criteria
may not be denied benefits if he is unable to afford the treatment that would help him”). The
28 Court agrees that the failure to acknowledge this testimony of the claimant further undermines the
ALJ’s credibility determination.

1 the ALJ's decision was not supported by substantial evidence, since the ALJ relied on an
2 incomplete hypothetical in reaching the Step Four determination. Specifically, Brown argues that
3 the ALJ improperly omitted from the vocational hypothetical his inability to use foot controls to
4 drive a truck, as well as his inability to stand or walk for more than 2 hours in an 8-hour work day
5 or lift 50 pounds repeatedly. Instead, he relied on "hypothetical number one," which omitted
6 critical functional limitations, resulting in a no-disability determination not supported by
7 substantial evidence in the record.

8 Where an expert opinion is based upon a hypothetical that omits significant limitations in
9 contradiction to the record, the Commissioner cannot rely on such opinion in its determination.
10 *Embrey v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988) ("Unless the record indicates that the ALJ
11 had specific and legitimate reasons for disbelieving a claimant's testimony as to subjective
12 limitations such as pain, those limitations must be included in the hypothetical in order for the
13 vocational expert's testimony to have any evidentiary value."). "If a vocational expert's
14 hypothetical does not reflect all the claimant's limitations, then the expert's testimony has no
15 evidentiary value to support a finding that the claimant can perform jobs in the national economy."
16 *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993).

17 Because the Court finds that the ALJ improperly disregarded Brown's testimony regarding
18 the extent and severity of his symptoms, as stated above, reliance on hypothetical number one was
19 not supported by the record and had no evidentiary value.

20 **C. Remand for Further Proceedings**

21 Brown requests that this matter be remanded for immediate payment of benefits, only in
22 the alternative seeks further administrative proceedings. The Court does not find it appropriate to
23 remand for immediate payment of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 595–96 (9th
24 Cir. 2004) (remand for immediate payment of benefits is reserved for "rare circumstances" where
25 there are no outstanding issues to be resolved and it is clear from the record that the claimant is
26 entitled to benefits).

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS** the Claimant's motion and **DENIES** the
3 Commissioner's motion for summary judgment. The matter is **REMANDED** for further
4 proceedings consistent with this opinion. 42 U.S.C. § 405(g).

5 The Clerk of the Court shall close the file.

6 This Order terminates Docket Numbers 19 and 20.

7 **IT IS SO ORDERED.**

8 Dated: June 11, 2019



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

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